Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-326

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in pending mass tort litigation, lawyers coordinating the claims of many plaintiffs are entitled to discover a defendant's overall estimate of the litigation reserves needed to settle and defend claims where that reserve estimate is based on the defendant's attorney's assessment of the settlement value and anticipated litigation expenses of individual plaintiff's claims.

2. Whether defendants forced into mass tort litigation may have their business redefined by a court as the "business of litigation" and thereby lose the work product and attorney-client privilege protections routinely afforded other less frequently sued defendants.

LIST OF PARTIES

The parties to the consolidated proceeding in the United States Court of Appeals for the Eighth Circuit, *Simon, et al. v. G. D. Searle & Co.*, No. 85-5334 MN, were G. D. Searle & Co., as appellant, and the following individuals, as appellees: Gail Olsby Bendt; Erica Jepson; Vicki Jepson; Walter Jepson; Carolyn Jewell; Kim M. Eisen; Deena L. Meyer; Theresa M. Schrader; Rolfe E. Schrader; Patricia LaVoie; Steve LaVoie; Susan J. Haug; Dennis Haug; Valerie P. Heller; Phillip M. Heller; Joanne Sobelman; Gerald Sobelman; Nancy L. Norring-Heyer; Douglas Heyer; Pamela J. Schmahl; Debra Crusoe; Gary Crusoe; Sandra Leigh Eggen; Kathleen Friedrich; Barbara J. Benson; Cheryl Stevenson; Denise O. Murray; Tammy Jacobs; Esther R. Kociemba; William J. Kociemba; Joan Timmerman; Gregory Timmerman; Alana Perper; Alan Perper; Romalynn P. Shreve; Robert Curtis Shreve; Bonnie Larson-Esswein; Bonnie Smith; Laura Robertson; Linda Vanderhaven; Debra Gambucci Stone; Darla Tesmer; Karen Ann Klempka; Anne Gamache; Rozanne Nelson; Amber Morgan; Sandra McNeill; Amy Alexy Bigelow; Rochelle Coleman; Connie Lynn Fallen; Daniel Fallen; Susan Lynch; Lisa Ann Larson; Sharon Wilson; Nancy Lundein; Paula Otterson; Gail Schendel; Kathryn Gregory; Anne Kivela; Ruth Hoppe; and Rose Mary Philippi.

Accordingly, the aforementioned appellees are also respondents to this Petition.

RULE 28.1 LISTING

The list required by Supreme Court Rule 28.1 is furnished in Appendix H. (App. 42.)

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In The

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G. D. SEARLE & CO.,

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v.

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

G. D. Searle & Co. ("Searle") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 816 F.2d 397 and is set forth in Appendix A. (App. 1.) The Eighth Circuit's denial of rehearing en banc by a five to five vote is not reported and is set forth in Appendix B. (App. 24.) The order of the United States District Court for the District of Minnesota adopting the findings of the special master is not reported and is set forth in Appendix C.

(App. 25.) The reports of the special master are not reported and are set forth in Appendices D, E and F. (App. 27—App. 40.) The Eighth Circuit's order granting Searle's motion to stay the mandate pending its filing of this petition for a writ of certiorari is set forth in Appendix G. (App. 41.)

JURISDICTION

This case was certified to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1292(b). On April 13, 1987, the Eighth Circuit entered judgment by divided vote. On July 7, 1987, Searle's petition for rehearing en banc was denied by an evenly divided court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

Federal Rules of Civil Procedure, Rule 26(b)(3):

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to

obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT OF THE CASE

Background

This case arises out of coordinated mass tort litigation relating to Searle's manufacture of the copper intrauterine contraceptive known as the Cu-7 IUD. Searle developed and tested the Cu-7 as a prescription drug in compliance with Food and Drug Administration regulations.

Approximately 480 individual product liability lawsuits relating to the Cu-7 are now pending against Searle. Fourteen trials have begun: eight trials resulted in jury verdicts in favor of Searle; one resulted in a voluntary dismissal after one and one-half weeks of trial; one settled after two days of trial; one, involving 17 consolidated actions, resulted in a directed verdict in favor of Searle which has been affirmed on appeal; and in one a mistrial was declared during voir dire and the case is scheduled to be retried. Only two cases resulted in verdicts in favor of the plaintiffs.

Forty-nine of the pending Cu-7 product liability cases were consolidated for discovery in the federal district court in Minnesota before Judge Miles W. Lord. (App. 2.) In July 1983, Judge Lord entered an order requiring Searle to produce "each and every document contained

in its files which relates to the Cu-7 IUD" and making all discovery against Searle in these cases available to all Cu-7 plaintiffs around the country. (App. 2.) The plaintiffs in these cases and those pending elsewhere have coordinated their discovery efforts and their nationwide litigation and settlement strategy. Plaintiffs' lead counsel in the Minnesota consolidated actions has sought to act as a clearinghouse for discovery against Searle and actively participates in the Cu-7 Litigation Steering Committee of the American Trial Lawyers Association.

Searle has complied with massive discovery requests and provided plaintiffs with information relating, among other things, to Searle's finances, and the dollar value of actual settlements in individual Cu-7 cases. (Affidavit of Thomas L. Bose, June 8, 1984, ¶ 9.) Searle objected when the plaintiffs also sought to obtain Searle's opinion of the projected aggregate value of all Cu-7 litigation.

This petition seeks review of the split decision of the Eighth Circuit denying Searle work product protection and attorney-client privilege for certain documents which reflect Searle's attorneys' estimates of individual case reserves and aggregate case reserves. These reserves were prepared by counsel in response to a specific request for legal advice by Searle and reflect Searle's attorneys' conclusions as to Searle's potential exposure in individual Cu-7 lawsuits and its total exposure. (*See, e.g.*, Affidavit of Roger C. Thies, April 6, 1984, ¶¶ 3, 6, 8.)

The Individual and Aggregate Case Reserves

When a Cu-7 claim or lawsuit is received by Searle, Searle requests that one of its attorneys set a case reserve. The case reserve is an estimate made by the at-

torney of the probable defense expense or "value" of the case. The reserve reflects the attorney's opinion as to anticipated legal expenses and potential settlement value given the particular type of alleged injury, geographic considerations, and other factors. (App. 6.) The individual case reserves are revised from time to time, based upon developments in individual cases. (Bose Affidavit, ¶¶ 5, 8.)

Searle's internal risk management department, in close consultation with counsel and Searle's insurers, uses the individual case reserves to project the aggregate or overall reserve that Searle will need to finance the defense and settlement of current and anticipated Cu-7 cases. To ascertain the aggregate reserve, the risk management department and Searle's counsel consider the individual actual case reserves set by counsel, the number of past claims, accuracy of past projections compared to actual expenses, increase or decrease in number of products in use, and the attorneys' opinions concerning the "litigation climate." (Affidavit of Eugene W. Bader, June 8, 1984, ¶ 9.) Many of the risk management department's documents also contain an average case reserve for the Cu-7 cases, which is derived by dividing the aggregate reserve by the number of outstanding Cu-7 cases. Searle's risk management group performs various calculations with the compiled reserve data to assist Searle's senior management in tracking, controlling, and planning for the costs of Searle's Cu-7 litigation. These financial planning documents, which use and reflect the case reserves and are based upon extensive discussions with counsel, are also at issue in this case. (*See* Bader Affidavit, ¶ 14.)

Reserve information is treated as highly confidential within Searle, and access to the data is restricted to

Searle's attorneys and risk management personnel and insurers with a "need to know." No financial report or any other document available to the public contains reserve information broken down according to product line or specific claim. (Bader Affidavit, ¶ 6.)

In supporting its assertion of attorney-client privilege and work product protection before the special master, Searle submitted lists describing the documents as to which Searle asserted privilege or work product protection and affidavits describing the authors, recipients, and purposes of the documents. (App. 27.) Searle also furnished selected documents under seal for an *in camera* inspection. (App. 27, 28, 35.)

The Special Master's Findings

The special master appointed by the district court to supervise discovery in the consolidated Cu-7 cases specifically found that individual case reserves were protected by the work product doctrine and the attorney-client privilege. (App. 30, 32.) The special master recognized that "[i]t would be unfair for a plaintiff to know how her particular case was assessed by Searle's lawyers." (App. 30.) The special master also found that the aggregate reserves were based upon specific case reserves, stating that "[s]ince the documents reveal aggregate case reserves and average case reserves, they reveal to some extent the methodology for setting case reserves." (App. 39.) Moreover, the special master acknowledged that "[p]laintiffs could take an aggregate reserve and determine an average reserve per case, which arguably gives plaintiffs some insight into Searle's attorneys' thought processes of setting reserves." (App. 31.)

Despite these findings, the special master held that documents revealing aggregate or average reserve information for the Cu-7 lawsuits were discoverable. The special master concluded that the aggregate and average case reserves were "prepared by corporate officials for business purposes such as budgeting questions, profitability analysis, and insurance needs," and that the work product doctrine "does not protect these business documents reflecting discussions among corporate officers . . . even if the discussions are based in part on information generated by litigation." (App. 30.) The special master failed to require that the plaintiffs make any showing that the documents were relevant or that the plaintiffs had any special need for the documents.

Finally, the special master did not consider that the documents were privileged because they reflected privileged attorney-client communications. Rather, the special master held that "those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications." (App. 31-32.)

The district court adopted the special master's report and granted Searle's request for certification pursuant to 28 U.S.C. § 1292(b).

The Eighth Circuit's Opinion

Although the Eighth Circuit recognized that Searle's case reserves would afford plaintiffs "nothing in the way of admissible evidence on the issue of liability or on the issue of damages, either compensatory or punitive," it nevertheless affirmed the district court's order by divided vote. (App. 15.)

The majority thought that the aggregate case reserve "serves numerous business planning functions, but [could

not] see how it enhances the defense of any particular lawsuit." (App. 8.) The majority concluded that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things," and that the documents therefore should be deemed to be ordinary business documents subject to discovery. (App. 8.) In so ruling, the majority ignored the special master's factual finding that the aggregate and average case reserves revealed "to some extent" the methodology of Searle's attorneys in setting the case reserves and that they give "some insight" into Searle's attorneys' thought process. Instead, the majority found that "when gathered into the aggregates no identifiable opinion work product remains" (App. 9 n.3), and that "the individual case reserve figures cannot be traced or inferred from the aggregate information." (App. 11 n.6.)

The court similarly rejected Searle's claim that the documents were shielded from discovery by the attorney-client privilege. Although acknowledging that "[t]he risk management documents reflect attorney-client communications running in two directions" (App. 10), the court declined to accord them protection. The court did "not believe that the aggregate information discloses the privileged communications . . . to a degree that makes the aggregate information privileged." (App. 11.)

In his dissent, Judge Gibson noted "a deep inconsistency" in the majority's "protecting the parts but determining that the sum of the parts and calculations based upon the protected figures are not protected." (App. 15.) Judge Gibson observed that "within the increasingly common context of mass products liability litigation, the aggregate and average figures may take on even greater significance." (App. 21.) Judge Gibson reasoned: "Just as a specific reserve figure gives an opponent an unfair advantage

in settlement negotiations, an aggregate reserve figure would give attorneys representing a group of opponents an equally unfair advantage." (App. 21.)

Judge Gibson also objected to the majority's failure to recognize that the opinion work product doctrine "gives virtually absolute protection to both the mental impressions of Searle's attorneys—as contained in the specific case reserve figures and necessarily reflected in the risk management documents—and the mental impressions of Searle's representatives, as contained in the risk management reports." (App. 16.)

Finally, Judge Gibson recognized that the majority's finding that Searle's business is litigation, "confronts Searle with a dilemma of Catch-22 proportions: if Searle were not involved in litigation, Rule 26(b)(3) would have no application, but because Searle is involved in litigation, the ordinary course of business exception applies. Thus, litigation, the event that triggers application of the rule, also triggers application of the exception." (App. 21.)

On April 27, 1987, Searle petitioned the Eighth Circuit for a rehearing en banc. Five judges voted to grant Searle's request and five judges voted to deny rehearing. Because a majority of the Eighth Circuit did not support a rehearing en banc, Searle's petition was denied. (App. 24.) On July 30, 1987, the Eighth Circuit stayed the mandate pending this Court's ruling on the petition for a writ of certiorari. (App. 41.)

REASONS FOR GRANTING THE WRIT

In coordinated mass tort litigation, the aggregate and average case reserves, figures which are purely the opinion of the defendant and his attorneys as to the projected cost and settlement value of all of the cases pending against him, are precisely as sensitive as individual case reserves in individual cases. Forced exposure of these figures to a coordinated plaintiffs bar will intrude on the thought processes of the defendant and his attorneys and give the plaintiffs unfair leverage in any negotiations aimed at settling these cases as a group. Moreover, disclosure of the aggregate information will allow the plaintiffs to derive individual average values for the cases which will then become a floor for settlement in each case.

The illogic of the divided Eighth Circuit opinion is that a defendant who is sued by only one or two plaintiffs will have greater protection than the beleaguered defendant sued by many plaintiffs. The defendant with only a few opponents will be protected from disclosure of his attorney's estimate of the value of the case; but the defendant facing a coordinated plaintiffs bar in multiple cases will have to reveal his attorneys' opinion about the aggregate value of his cases.

This petition therefore raises substantial issues concerning the application in mass tort litigation of the federal policy favoring frank discussions between attorneys and clients on the issue of settlement and litigation strategy and the doctrines that enforce this policy, the attorney work product doctrine and the attorney-client priv-

ilege. This issue is urgent; mass tort litigation is growing at an exponential rate in this country.[1]

The Eighth Circuit's ruling dramatically departs from the mandate of Rule 26(b)(3), requiring special protection for attorneys' opinions. In addition, the Eighth Circuit majority improperly considered the degree to which documents reflect work product or privileged communications, in direct conflict with the teachings of this Court and the decisions of other Circuit Courts of Appeals. Finally, the Eighth Circuit's ruling that both work product and attorney-client privileged documents lose their protected status when they are also used for a "business purpose" works a gross injustice on individuals and corporations faced with numerous cases. Under the Eighth Circuit ruling, defendants forced into mass tort litigation may have their businesses redefined by a court as the "business of litigation" and thereby lose the protection routinely afforded other less frequently sued defendants.

The Eighth Circuit's decision threatens to erode the attorney-client relationship and chill litigants from consid-

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[1] The issues raised by this petition affect tens of thousands of lawsuits that have assumed the sobriquet "mass tort." Mass tort cases include cases arising out of mass accidents and products liability cases filed by persons located all over the country. In the five years between 1978 and 1983, the number of products liability cases, the greatest single group of mass tort cases, filed in federal courts more than doubled, and at least ten thousand new cases are likely to be filed each year. *See* Admin. Office of U.S. Cts., 1983 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., 122, 129-31. The number of products liability cases filed in federal district courts increased another 20.6% between 1983 and 1984. Admin. Off. of U.S. Cts., 1984 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., 131. In 1985, the number of such cases increased by an additional 27%. Admin. Off. of U.S. Cts., 1985 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., 138.

ering all the factors that bear on a decision to try or settle lawsuits. It is precisely this danger that the work product doctrine and the attorney-client privilege are intended to prevent. The Eighth Circuit's divided decision so far departs from the rationale of these doctrines and the prior rulings of this Court that review by this Court is warranted. This Court should grant certiorari and set this case down for plenary consideration.

A.

THE EIGHTH CIRCUIT'S RULING IN THIS CASE CONFLICTS WITH *HICKMAN v. TAYLOR* AND *UPJOHN CO. v. UNITED STATES* AND DECISIONS OF FIVE CIRCUIT COURTS OF APPEALS.

The Eighth Circuit's failure to recognize the need to protect aggregate case reserve information in mass tort cases directly conflicts with this Court's teachings in *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981), and with the holdings of the United States Court of Appeals for the District of Columbia, and the Third, Fourth, Fifth and Seventh Circuits. *See In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re International Systems & Controls Corp. Securities Litigation (Koenig)*, 693 F.2d 1235 (5th Cir. 1982); *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980). Each of these cases holds that material reflecting an attorney's mental impressions, conclusions, judgments or legal theories is accorded special, nearly absolute protection from discovery. *See* Fed. R. Civ. P. 26(b)(3).

In *Hickman v. Taylor*, this Court initially recognized the importance of protecting the tangible and intangible materials which reflect a lawyer's proper preparation of a client's case. Such preparation requires a lawyer to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." 329 U.S. at 511. Indeed, this Court cautioned that,

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id.

In *Upjohn*, Chief Justice Rehnquist, writing for a unanimous Court, stressed the importance of according "special protection to work product revealing the attorney's mental processes." 449 U.S. at 400. The *Upjohn* trial court had directed production of an attorney's notes and memoranda of oral interviews with witnesses. The trial court applied the standards applicable to fact work product, and required the plaintiff to demonstrate that he had a "substantial need" for the material and would be unable to obtain the substantial equivalent of the materials by other means "without undue hardship." Reversing, the Supreme Court held that the material was opinion work product deserving special protection. 449 U.S. at 441.

In *Upjohn*, this Court recognized that the Courts of Appeals were divided as to whether any showing of necessity could ever overcome the protection afforded opinion work product. The Court stated:

> While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.

449 U.S. at 401-02.

Since *Upjohn*, the Courts of Appeals have accorded work product material nearly absolute protection. *See, e.g., Sporck*, 759 F.2d at 316 (3d Cir. 1985) ("almost absolute protection"); *Koenig*, 693 F.2d at 1240 (5th Cir. 1982) (noting that courts have "provided an almost absolute protection for such materials"); *In re Sealed Case*, 676 F.2d at 810 (D.C. Cir. 1982) (extraordinary justification is required to overcome work product protection); *In re Special September 1978 Grand Jury*, 640 F.2d at 63 (7th Cir. 1980) (extraordinary need must be shown); *Duplan Corp.*, 509 F.2d at 734 (4th Cir. 1974) ("no showing of relevance, substantial need or undue hardship should justify compelled disclosure" of opinion work product). Information which reveals much less about an attorney's thought processes than the value of cases has been held to be highly protected opinion work product. For example, the Third Circuit, following *Upjohn*, has precluded discovery of documents collected by an attorney to prepare a client for a deposition because the selection process itself could reveal counsel's mental impressions and legal opinions on the issues and defenses in litigation. *See Sporck*, 759 F.2d 312 (3d Cir. 1985); *accord Omaha Public Power District v. Foster Wheeler Corp.*, 109 F.R.D. 615 (D. Neb. 1986).

Searle's case reserves are the paradigm of opinion work product and therefore merit even greater protection than the material in either *Upjohn* or *Sporck*. As Judge Gibson's dissent recognized, the calculation of case reserve figures, requiring the attorney to weigh and evaluate the merits of a case, involves a substantially more complex legal judgment than that involved when an attorney selects relevant and material documents. (App. 18.) Searle's aggregate and average reserve figures for the Cu-7 litigation not only give "some insight" into the mental processes involved in setting a specific case reserve and reveal Searle's methodology for setting case reserves, as the special master found (App. 31, 39), they give undiluted insight into Searle's counsels' view of their projected total litigation costs. A lawyer must combine expertise and knowledge in order to project an estimate of the value of a legal claim and the fees and expenses that may be incurred. This effort requires the lawyer to assess the evidence and the legal issues involved and to evaluate the case's strengths and weaknesses. The result is pure opinion expressed in a dollar figure.[2]

The plaintiffs already have access to all actual settlement figures. (App. 31.) Searle has answered interrogatories

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[2] Because they are only opinion, Searle's aggregate and average case reserve documents are fundamentally different from insurance documents. Insurance documents covered by Rule 26(b)(2) reveal factual information, *i.e.*, a defendant's maximum coverage. They do not reveal attorneys' estimates of potential liability. The plaintiffs already have had access to Searle's information revealing the amount for which Searle has settled cases similar to theirs. Therefore, the discovery contemplated by Rule 26(b)(2), which permits insurance discovery, has been accomplished here and is not in dispute. Unlike documents reflecting the amount for which a defendant is insured, the risk management documents reveal the value which Searle's attorneys have projected for the Cu-7 cases.

providing this information. (App. 31; Bose Affidavit, June 8, 1984, ¶ 9.) Searle's attorneys' projection of the worth of these cases has no factual component which plaintiffs have been denied.

The damaging effect of removing work product protection for aggregate case reserves is particularly acute in the context of mass tort litigation. Just as a specific reserve figure gives an opponent an unfair advantage in settlement negotiations in an individual case, an aggregate reserve figure gives attorneys representing a group of opponents an equally unfair advantage. In addition, mass tort plaintiffs can take the aggregate reserve data, divide it by the number of cases and use the resulting figure to establish minimum settlement amounts.

Sharing of discovery information and settlement strategy is the signal characteristic of mass tort litigation. In mass tort cases, individual plaintiffs typically form a coordinating committee that conducts discovery which is then shared with all participating plaintiffs.[3] In this case, Robins, Zelle, Larson & Kaplan, the Minnesota Cu-7 plaintiffs' lead counsel, has not only coordinated discovery here, it has sold packages of discovery materials and has even sought relief in a non-Minnesota case to prevent a plaintiff from

[3] There has been shared discovery in some widely publicized cases, including the lawsuits involving the Dalkon Shield, the Chevrolet motor mount failure litigation, and the diethylstilbestrol, Aralen, and MER/29 drug cases. *See* Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, Litigation, Spring, 1977 at 18-19. Discovery sharing is also accomplished through information exchanges such as "The ATLA Exchange" operated by the Association of Trial Lawyers of America. *See* Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 Wis. L. Rev. 1055, 1057-58 n.14 (1985). *See also Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982) (discovering party admitted his plans to add discovered information to the Attorneys Information Exchange Group information pool).

getting Searle documents directly from Searle rather than paying Robins, Zelle for it. (Weinstein Affidavit and Exhibits.)[4]

Class actions have been certified in mass tort cases pursuant to the federal policy favoring global settlements of litigation.[5] In certified cases, it cannot be disputed that knowledge of aggregate and average reserve information would give the coordinated plaintiffs bar unfair insight into the defendant's attorneys' thought process precisely in a way both the Eighth Circuit and the magistrate held was improper as to individual case reserves in individual cases.

In adopting Rule 26(b)(3), the Advisory Committee observed that the required special showing to permit access to trial preparation materials "reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side." Allowing Searle's litigation adversaries access to

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[4] *See generally* Ranii, *How the Plaintiff's Bar Shares Its Information*, Nat'l L.J., July 23, 1984, at 1, col. 3; *Lawyers Who Won Verdicts in Rely Trials Are Selling Their Evidence Angering P & G*, Wall St. J., December 20, 1982, at 19, col. 4 (Denver firm purchased the rights to discovered information from its clients and created handbooks selling for $1,000 each).

[5] Cases that have been consolidated for settlement include *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *see also In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 173-78 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (use of tentative settlement classes to facilitate settlement prior to formal certification of class action for trial purposes is permissible).

the aggregate and average case reserves "would be an intolerable intrusion on the bargaining process," allowing "one party to take advantage of the other's assessment of his prospects for victory." Cooper, *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269, 1283 (1969).

Even if one insists, as did the Eighth Circuit, on focusing on the diluted insight the aggregate case reserves give to the individual case reserves, the amount or concentration of privileged material has never been used as a criterion for applying the opinion work product doctrine. The opinion work product doctrine does not merely protect documents that reveal an attorney's undiluted mental impressions. Instead, the doctrine protects information that even "tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399.

When the material sought is so central to an attorney's opinion work product as individual case reserves, which are the foundation for all of the aggregate and average figures, Rule 26(b)(3) and *Upjohn* mandate that this material be accorded special protection. The Eighth Circuit's failure to require the plaintiffs to make any showing of need, let alone the extraordinary need required to discover attorneys' mental impressions, directly conflicts with this Court's teachings in *Hickman v. Taylor* and *Upjohn*, as well as the holdings of all other courts of appeals which have addressed the issue.

B.

THE EIGHTH CIRCUIT'S DECISION TO DENY ATTORNEY-CLIENT PRIVILEGE BECAUSE THE DOCUMENTS ARE NOT SUFFICIENTLY REVEALING CONFLICTS WITH THE HOLDINGS OF OTHER COURTS.

The Eighth Circuit's decision that the attorney-client privilege is inapplicable to documents which indirectly reflect a privileged attorney-client communication conflicts with the holdings of other courts. Contrary to the Eighth Circuit's holding, courts have repeatedly held that the attorney-client privilege is absolute for all documents based on attorney-client communication. *U.S. v. Cuthbertson*, 651 F.2d 189, 198 (3d Cir.) (Seitz, J., concurring), *cert. denied*, 454 U.S. 1056 (1981); *U.S. Dept. of Energy v. Crocker*, 629 F.2d 1341, 1344-45 (Em. Ct. App. 1980); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977). Most courts recognize that the protections of the attorney-client privilege are not limited to communications from clients to attorneys. Rather, a communication from an attorney to a client which tends to reveal a confidential client communication also is protected. *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 252, 254 (D.C. Cir. 1977); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1096 n.7 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Natta v. Hogan*, 392 F.2d 686, 692-93 (10th Cir. 1968); *accord In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 388 (D.D.C. 1978); *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

Similarly, in *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982), the Ninth Circuit held that documents such as bills, ledgers, statements and attorney time records were within the scope of the attorney-client privilege because they revealed attorney-client communications. *See also In re Witnesses Before The Special March 1980 Grand*

Jury, 729 F.2d 489, 495 (7th Cir. 1984) (in remanding, court stated that "billing sheets or time tickets which indicate the nature of documents prepared, issues researched or matters discussed could reveal the substance of confidential discussions between attorney and client" and might be privileged). Like the risk management documents, the documents in *Salas* revealed a privileged communication in an indirect manner. Having found that "the risk management documents reflect attorney-client communications running in two directions" (App. 10), the Eighth Circuit should have accorded those communications absolute protection.

C.

THE EIGHTH CIRCUIT'S RULING THAT BOTH THE WORK PRODUCT DOCTRINE AND ATTORNEY-CLIENT PRIVILEGE ARE VITIATED WHEN DOCUMENTS ARE USED FOR BUSINESS PURPOSES DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *IN RE GRAND JURY WITNESS (SALAS).*

The Eighth Circuit erred in concluding that work product protection and the attorney-client privilege are vitiated whenever privileged material is used by a client or an attorney for any business purpose, even if the business purpose is simply to avoid destruction of the business by litigation. The Eighth Circuit's logic would render work product protection meaningless in *any* mass tort litigation, where large corporate defendants necessarily make litigation and settlement decisions based on financial and other business considerations.

It is difficult to imagine any document that is generated in anticipation of litigation that might not also have some business function; litigation and business purposes are not mutually exclusive. Under the panel's reasoning, almost

every document prepared by a lawyer or client would be subject to discovery despite Rule 26(b)(3)'s clear mandate that opinion work product must be protected.

In the present case, the business purposes of Searle's case reserve documents were to keep track of, control, and to plan for the costs of Searle's pending product liability litigation. Under the majority's reasoning, if Searle had only a few cases to manage and could employ only one lawyer, the result would have been different. But the tracking of case reserves which was managed by Searle's risk management department became necessary because Searle became an unwilling defendant in a large number of cases.

Only by concluding that, in light of the quantity of lawsuits Searle faces, a court may redefine Searle's business as the "business of litigation" could the majority convert these litigation oriented documents into business planning documents. The majority reached just that conclusion, when it reasoned that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales and many other things." (App. 8.) As the dissenting judge recognized, the majority ultimately confronted Searle with an insoluble dilemma: if Searle were not involved in mass tort litigation, the work product doctrine would have no application, but because Searle is involved in litigation, an ordinary course of business exception to the doctrine is deemed to apply. (App. 21.) Thus, litigation, the very event that triggers application of the doctrine, is also deemed to remove the work product from the doctrine's protection, but only for defendants sued by many plaintiffs.

No other court has so eviscerated both the work product doctrine and attorney-client privilege. The Eighth Circuit's ruling is in direct conflict with the Ninth Circuit's

ruling in *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982) (holding that business documents such as bills, ledgers, statements and attorney time records which revealed attorney-client communications in a diluted form were protected by the attorney-client privilege). *See also In re Witness Before The Special March 1980 Grand Jury*, 729 F.2d at 495 (7th Cir. 1984) (on remand, court should consider whether attorney billing sheets and time tickets reveal the substance of attorney-client communications and are therefore protected by attorney-client privilege); *Real v. The Continental Group, Inc.*, No. C-83-2871, slip op. (N.D. Cal. November 10, 1986) (billing statements are protected by work product privilege); *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201 (D.D.C. 1985) (business considerations in legal advice do not vitiate attorney-client privilege); *Tronitech, Inc. v. NCR Corp.*, 108 F.R.D. 655 (S.D. Ind. 1985) (audit letter prepared by attorney estimating the financial implications of a lawsuit is protected work product); *In re LTV Securities Litigation*, 89 F.R.D. 595, 601 (N.D. Tex. 1981) ("[i]nformation gathered in such a manner as to be privileged does not become discoverable solely because management makes other business use of the information"); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976) ("privileged advice does not lose its protection when the client adopts it").

By concluding that the aggregate case reserves documents are discoverable, the Eighth Circuit has made it extremely hazardous for any business defending mass tort cases to finance and plan for its defense. In addition, the court's decision threatens to chill litigants from properly documenting and considering all the factors that bear upon the decision to try or settle lawsuits. These are precisely the dangers the work product doctrine is intended to

prevent. *See Hickman v. Taylor*, 329 U.S. at 511 ("[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten."). *Cf. Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976) ("the cause of justice is advanced by settlement compromises sheparded [sic] by competent counsel, whose experience as advocates makes them reliable predictors of litigation were it pursued to the bitter end.").[6]

In the context of a mass tort case, therefore, aggregate and average assessments of attorneys' mental impressions, thoughts and conclusions take on added significance. Where, as here, a court of appeals has ignored this Court's teachings that attorney-client communications and opinion work product must be protected and has departed from the normal course of judicial proceedings, this Court should grant certiorari to preserve for mass tort defendants the protections afforded all other defendants.

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[6] When defendants are inhibited from accurately assessing the values of their cases and whether settlements are appropriate, the interests of mass tort plaintiffs are hurt too. As Judge Alvin Rubin observed recently, the costs of litigation today now exceed by more than twice the amount of the net recovery of successful claimants. Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429, 434 (1986) (citing Senate Comm. on Commerce, Science and Transportation, Product Liability Act Report, S. Rep. No. 476, 98th Cong., 2d Sess. 7 (1984)). *See also* Comment, *Issues in Asbestos Litigation*, 34 Hastings L.J. 871, 903 n.192 (1983) ("80 to 90 cents of every dollar spent in asbestos litigation is consumed by attorneys' fees and related legal expenses."); J. Kakalik, P. Ebener, W. Felstiner, M. Shanley, *Costs of Asbestos Litigation* (1983) (published by the Rand Corporation's Institute for Civil Justice) (finding that for every fifty-nine dollars paid to claimants in product liability cases, ninety-nine dollars is paid by both claimants and defendants just for legal services). The prospect of further protracted, unsettled litigation holds no advantage for the plaintiffs, as opposed to their counsel.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted and the case set down for plenary consideration.

Respectfully submitted,

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Dated: August 26, 1987

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5334

Debra A. and George Simon, et al.,	)	
Appellees,	)	Appeal from the United States District Court for the District of Minnesota.
v.	)	
G.D. Searle & Co.,	)	
Appellant.	)	

Submitted: March 13, 1986
Filed: April 13, 1987

Before JOHN R. GIBSON and WOLLMAN, Circuit Judges, and HARRIS,* Senior District Judge.

WOLLMAN, Circuit Judge.

G.D. Searle & Co. appeals the district court's order permitting discovery of certain Searle documents. Pursuant

* The HONORABLE OREN HARRIS, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

to 28 U.S.C. § 1292(b) (Supp. III 1985), the district court found that its order involved controlling questions of law as to which there was substantial ground for difference of opinion and certified two questions for appeal. The issues in this appeal, reflected in the district court's certified questions, are, first, whether corporate risk management documents prepared by nonlawyer corporate officials, but revealing aggregate information compiled from individual case reserve figures determined by lawyers, are protected from discovery by the work product doctrine or the attorney-client privilege, and, second, whether Rule 26(b)(2) of the Federal Rules of Civil Procedure limits discovery of corporate risk management documents that relates to insurance.

Searle manufactures an intrauterine contraceptive device known as the "Cu-7." Approximately forty products liability actions pending against Searle in the United States District Court for the District of Minnesota and seeking damages for injuries alleged to have resulted from use of the Cu-7 were consolidated for discovery and have generated this appeal. The district court appointed a special master to supervise the discovery process in these cases.

The district court[1] originally ordered Searle to produce "each and every document contained in its files which relates to the Cu-7 IUD." Although Searle produced approximately 500,000 documents to appellees and has continued to provide documents, it resisted the discovery of certain documents from its risk management department. Searle's risk management department monitors the company's products liability litigation and analyzes its litigation reserves, apparently utilizing individual case reserve figures determined by the legal department's assessment of litigation expenses. The risk management department also has re-

[1] The Honorable Miles W. Lord, United States District Judge for the District of Minnesota, retired September 11, 1985. All of the orders relevant to this appeal were issued prior to Judge Lord's retirement. The cases have since been assigned to the Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

sponsibility for the company's insurance coverage. Insofar as Searle's products liability insurance has a high deductible amount, the company is in some respects self-insured.

Pursuant to a district court order, the documents at issue were provided to the special master for *in camera* review. The special master filed with the court his Reports I and II, containing his recommendations concerning the individual documents. He found that the risk management documents were protected by the work product doctrine to the extent that they revealed "specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case," and by the attorney-client privilege if they included communications between an attorney and client concerning legal advice made and kept in confidence. Report I of Special Master, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 5-7 (D. Minn. Aug. 22, 1984). Documents that revealed aggregate reserve information not identified with individual cases were found discoverable. *Id.* at 5-6. The district court adopted the special master's reports and granted Searle's request for certification pursuant to 28 U.S.C. § 1292(b) in an order issued June 7, 1985. The special master's Report III proposed the questions for appeal, which the district court accepted and certified. The district court also stayed its June 7 order so far as it related to risk management and insurance documents, pending the outcome of this appeal. We granted Searle's petition for permission to appeal.

The questions certified for appeal are as follows:

> 1. To what extent, if any, should Searle's "Risk Management" documents, prepared by nonlawyer corporate officials in an attempt to keep track of, control and anticipate costs of product liability litigation for business planning purposes (including budgetary, profitability and insurance analysis), be protected from discovery by the Work Product Doctrine or the Minnesota attorney-client privilege because some portions of the documents reveal aggregate case reserves and aggregate litigation expenses for all pending

cases when each individual case reserve is determined by Searle's lawyers on a confidential basis in anticipation of litigation?

2. To what extent, if any, does Fed.R.Civ.P. 26(b)(2) limited [sic] the discoverability of Searle's "Risk Management" documents that relate to insurance considerations?

I

STANDARD OF REVIEW

A preliminary question confronting us is the standard of review applicable to an appeal of discovery orders under 28 U.S.C. § 1292(b). That section allows appeals, at the discretion of the court of appeals, when the district judge believes that his action "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (Supp. III 1985). Appellees argue that we should not disturb the district court's discretion in discovery matters absent a "gross abuse of discretion resulting in fundamental unfairness." *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977); *see also Prow v. Medtronic, Inc.*, 770 F.2d 117, 122 (8th Cir. 1985). Searle contends that our role is not so restricted in an appeal under section 1292(b) and cites *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 871 (8th Cir. 1977). In *Sperry Rand* the court stated that the petitioner's choice of a mandamus action, for which the standard of review is whether the district court exceeded the " 'sphere of its discretionary power,' " *id.* at 872 (quoting *Will v. United States*, 389 U.S. 90, 104 (1967)), instead of a section 1292(b) appeal, seriously narrowed the scope of appellate review. We agree with Searle that our review in this section 1292(b) appeal is not confined to determining whether the district court abused its discretion. *See* 9 J. Moore, *Moore's Federal Practice* ¶ 110.22[5] (2d ed. 1986) (review for abuse of discretion not suited to section 1292(b) be-

cause there is no controlling question of law). Section 1292(b) permits the appeal of orders otherwise unappealable and thus provides an avenue for resolving disputed and controlling questions of law, the resolution of which will materially further the litigation. Therefore, we review *de novo* the questions of law certified by the district court. Where, as here, the certified questions embody both factual and legal considerations, we should endeavor to give deference to the district court's factual determinations. We note, however, that the nature and scope of our review are not rigidly determined by the certified questions. *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 793 n.5 (7th Cir. 1981). We remain free to consider " ' "such questions as are basic to and underlie" ' " the questions certified by the district court. *Id.* (quoting *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1335 (7th Cir. 1977) (quoting 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 270)); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962 n.7 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984).

II

WORK PRODUCT DOCTRINE

Searle's first argument is that its risk management documents are protected from discovery by the work product doctrine. That doctrine was established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and is now expressed in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides that "a party may obtain discovery of documents and tangible things * * * prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative * * * only upon a showing that the party seeking discovery has substantial need of the materials." Our application of the work product doctrine to specific documents is guided by the purposes of the doctrine set out in *Hickman*. *See In re Murphy*, 560

F.2d 326, 333-34 (8th Cir. 1977). The work product doctrine was designed to prevent "unwarranted inquiries into the files and mental impressions of an attorney," *Hickman*, 329 U.S. at 510, and recognizes that it is "essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510-11.

The special master found that the risk management documents at issue were generated in an attempt to keep track of, control, and anticipate the costs of Searle's products liability litigation; the documents have been so identified in the district court's first certified question. Report I of Special Master, *supra*, at 2. Many of the documents include products liability litigation reserve information that is based on reserve estimates obtained from Searle's legal department. When Searle receives notice of a claim or suit, a Searle attorney sets a case reserve for the matter. Case reserves embody the attorney's estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors. Affidavit of Eugene W. Bader, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 2 (D. Minn.) (Bader oversees Searle's risk management program). The individual case reserves set by the legal department are then used by the risk management department for a variety of reserve analysis functions, which the special master found were motivated by business planning purposes including budget, profit, and insurance considerations.

The work product doctrine will not protect these documents from discovery unless they were prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3); *see In re Grand Jury Subpoena*, 784 F.2d 857, 862 (8th Cir. 1986), *cert. dismissed sub nom. See v. United States*, 107 S. Ct. 918 (1987). Our determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination:

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have

> been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970) (footnotes omitted); *see Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977), *on rehearing*, 572 F.2d 606 (8th Cir. 1978) (en banc); *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 844-48 (1983). The advisory committee's notes to Rule 26(b)(3) affirm the validity of the Wright and Miller test: "Materials assembled in the ordinary course of business * * * or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." Fed. R. Civ. P. 26(b)(3) advisory committee notes. Applying this test, we do not believe it can be said that the risk management documents were prepared for purposes of litigation. We are no better qualified to evaluate the facts of this case than the special master and the district court,[2] and we believe their conclusion that the risk management documents are in the nature of business planning documents is a reasonable factual conclusion. The risk management department was not involved in giving legal advice or in mapping litigation strategy in any individual case. The aggregate reserve information in the risk management docu-

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[2] The special master, with the aid of affidavits, document summaries, and briefs from the parties, reviewed all of the documents at issue *in camera* and in his Reports I and II made recommendations as to each document and in some instances as to sections within the documents. The district court adopted the special master's recommendations after a hearing that included oral argument by the parties and testimony by the special master. Our review has been informed by a record containing all of these materials, with the exception that only six sample documents have been submitted to us *in camera* out of the approximately 400 documents that were provided to the special master.

ments serves numerous business planning functions, but we cannot see how it enhances the defense of any particular lawsuit. Searle vigorously argues that its business is health care, not litigation, but that is not the point. Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things. A business corporation may engage in business planning on many fronts, among them litigation.

Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by Searle's attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product. *Hickman*, 329 U.S. at 512; *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). We do not believe, however, that the aggregate reserve information reveals the individual case reserve figures to a degree that brings the aggregates within the protection of the work product doctrine. The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even direct compilations of the individual figures; the aggregate information is the product of a formula that factors in variables such as inflation, further diluting the individual reserve figures. Certainly it would be impossible to trace back and uncover the reserve for any individual case, and it would be a dubious undertaking to attempt to derive meaningful averages from the aggregates, given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries. The purpose of the work product doctrine—that of preventing discovery of a lawyer's mental impressions—is not violated by allowing discovery of documents that incorporate a lawyer's thoughts in, at

best, such an indirect and diluted manner.[3] Accordingly, we hold that the work product doctrine does not block discovery of Searle's risk management documents or the aggregate case reserve information contained therein.

III

ATTORNEY-CLIENT PRIVILEGE

Searle also argues that its risk management documents are protected by the attorney-client privilege. Rule 501

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[3] This conclusion is consistent with the holding of *In re Murphy*, 560 F.2d 326, 336 n.20 (8th Cir. 1977), that opinion work product is discoverable only in "rare and extraordinary circumstances." The individual case reserve figures are nondiscoverable opinion work product, but when gathered into the aggregates no identifiable opinion work product remains.

The same observation also applies to *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985), and to this court's recent decision in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). *Sporck* involved discovery attempts relating to a group of documents that were used to prepare for a deposition. The court held that defense counsel's selection of certain documents, out of the thousands involved in the litigation, to prepare a deponent was protected by the work product doctrine, because allowing identification of the documents as a group would reveal counsel's mental impressions. *Shelton* involved a deposition of defendant's in-house counsel, who was questioned as to the existence of certain documents. The court held that the work product doctrine protected knowledge of the existence of the documents, because any recollection of a document's existence would mean that it was important enough to remember, and thus "necessarily would reveal [counsel's] mental selective process." *Shelton*, 805 F.2d at 1329. As we have said, the nature of the aggregate reserve figures at issue here is such that revealing them will not necessarily reveal the specific case reserves and the protected mental impressions embodied therein. In both *Sporck* and *Shelton*, counsel's mental impressions, namely the impressions that certain documents were important or significant, would have been exposed to the world. Clairvoyants aside, no one will learn from the aggregate reserve figures what Searle's attorneys were thinking when they set individual case reserves.

of the Federal Rules of Evidence provides that evidentiary privileges are to be determined in accordance with state law in diversity actions. Consequently, the Minnesota attorney-client privilege, codified at Minn. Stat. Ann. § 595.02(2) (West Supp. 1987),[4] is applicable here.

The risk management documents reflect attorney-client communications running in two directions. First, the aggregate reserve information contained in the documents incorporates the individual case reserve figures communicated by the legal department to the risk management department—an attorney-to-client communication. Second, the record indicates that some of the risk management documents themselves were delivered to Searle attorneys—a client-to-attorney communication.

Assuming *arguendo* that the attorney-client privilege attaches to the individual case reserve figures communicated by the legal department to the risk management department,[5] we do not believe the privilege in turn attaches to the risk management documents simply because they

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[4] Minn. Stat. Ann. § 595.02(2) (West Supp. 1987) provides:

> An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

[5] We state no view whether the attorney-client privilege in fact attaches to the individual case reserve figures, other than to note that such a determination would require analysis of whether the individual reserve figures are based on confidential information provided by Searle. *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3d Cir. 1980); *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977); *see also Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). We need not decide whether the individual case reserve figures are protected in the light of our determination that even if they are it does not follow that the aggregate information in the risk management documents also is protected.

include aggregate information based on the individual case reserve figures. For the reasons that we have already stated in relation to the work product doctrine, we do not believe that the aggregate information discloses the privileged communications, which we are assuming the individual reserve figures represent, to a degree that makes the aggregate information privileged.[6] The attorney-to-client communications reflected in the risk management documents are therefore not protected by the attorney-client privilege.

Although the aggregate reserve information does not confer attorney-client privilege protection to the risk management documents, those documents that were given to Searle attorneys may still be privileged client-to-attorney communications. The special master devoted only a very brief discussion to this matter. Relying on *Brown v. St. Paul City Ry.*, 62 N.W.2d 688 (Minn. 1954), the special master stated: "A business document is not made privileged by providing a copy to counsel. * * * Thus, those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications." Report I of Special Master, *supra*, at 7 (citation omitted). We perceive no error in this statement of the law, which appears to have been carefully applied by the special master to the point of redacting sections of privileged material from within individual documents.

Minnesota adheres to Professor Wigmore's classic statement of the attorney-client privilege, which requires that an attorney-client communication relate to the purpose of

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[6] When a client acts on privileged information from his attorney, the results are protected from discovery to the extent that they disclose the privileged matter, directly or inferentially. *Cf. Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977). Our holding is faithful to this principle. As we have discussed, the individual case reserve figures cannot be traced or inferred from the aggregate information.

obtaining legal advice before it is protected.[7] *Brown v. St. Paul City Ry.*, 62 N.W.2d 688, 700 (Minn. 1954) (quoting 8 Wigmore, *Evidence* § 2292 (3d ed.)); *see National Texture Corp. v. Hymes*, 282 N.W.2d 890, 895-96 (Minn. 1979). Moreover, a number of courts have determined that the attorney-client privilege does not protect client communications that relate only business or technical data. *See First Wis. Mortgage Trust v. First Wis. Corp.*, 86 F.R.D. 160, 174 (E.D. Wis. 1980); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515 (D. Conn.) ("[l]egal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality"), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976). Just as the minutes of business meetings attended by attorneys are not automatically privileged, *see International Tel. & Tel. Corp. v. United Tel. Co.*, 60 F.R.D. 177, 185 (M.D. Fla. 1973); *Air-Shield, Inc. v. Air Reduction Co.*, 46 F.R.D. 96, 97 (N.D. Ill. 1968), business documents sent to corporate officers and employees, as well as the corporation's attorneys, do not become privileged automatically. Searle argues, however, that the special master formulated a *per se* rule barring privilege claims where a document is sent to corporate officials in addition to attorneys. We do not read the special master's report as establishing such an approach. Client communications intended to keep the attorney apprised of business matters may be privileged if they embody "an implied request for legal advice based thereon." *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971). Based on this view of the special master's report, we do not

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[7] 8 Wigmore, *Evidence* § 2292 (McNaughton rev. 1961) (emphasis omitted) states:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

understand the district court to have taken an errant position on the law of the attorney-client privilege. Having stated the applicable law, and noting that there are only six sample documents before us, we decline any invitation to determine the applicability of the privilege to individual documents.

IV

SCOPE OF RULE 26(b)(2)

The district court's second certified question concerns whether Fed. R. Civ. P. 26(b)(2) limits discovery of the corporate risk management documents. Rule 26(b)(2) provides:

> A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Searle argues that Rule 26(b)(2) contains an implicit limitation on the discovery of insurance information beyond the insurance agreement itself. Searle has produced its insurance policies. It now argues that all other insurance information, which it defines to include its reserve information, is nondiscoverable. Appellees respond that Rule 26(b)(2) was not intended to limit discovery but to end the conflict over the relevancy of insurance policies for discovery purposes. Thus we are presented with the question whether the reserve information of a self-insured defendant is discoverable.

The advisory committee's notes to Rule 26(b)(2) reveal that the rule, which was included in the 1970 amendments to the Federal Rules, was not intended to change existing law on discovery concerning self-insured businesses that maintain a reserve fund. Fed. R. Civ. P. 26(b)(2) advisory committee notes; *see Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 & n.16 (1978). Therefore, the control-

ling law on this question is that which would have applied to insurance agreements before the 1970 amendments, together with any recent developments concerning insurance documents other than agreements. Prior to the 1970 amendments, "the discovery of matters pertaining to insurance depend[ed] on whether such information was 'relevant to the subject matter' or 'reasonably calculated to lead to admissible evidence.' " 4 J. Moore, *Moore's Federal Practice* ¶ 26.62[1] (2d ed. 1986). This standard, which comes from Fed. R. Civ. P. 26(b)(1), remains applicable to insurance documents other than agreements. We cannot agree with Searle that Rule 26(b)(2) forecloses discovery of any insurance document beyond the agreement. First, the language of the rule itself plainly is not preclusive. Second, the advisory committee expressed concern, at least as to indemnity agreements, that Rule 26(b)(2) not be interpreted to protect insurance information from discovery when that information is relevant under Rule 26(b)(1). *See id.* ¶ 26.62[2]. We hold, therefore, that insurance documents that are not discoverable under Rule 26(b)(2) remain discoverable in accordance with the provisions of Rule 26(b)(1).[8] *Id.*

V

CONCLUSION

Although we have no disagreements with the law as stated by the special master, we recognize that our analysis may have resolved sub-issues not anticipated by the district court. We therefore instruct the district court to re-

[8] The district court reached the same conclusion, and decided that the risk management documents were discoverable under Rule 26(b)(1) because they relate to issues of notice, defect, and punitive damages. We find no reason to disturb this application of the relevant legal standard. Moreover, we also agree with the district court that even if Rule 26(b)(2) were to prevent discovery of insurance documents, we are doubtful that the risk management documents correctly can be termed insurance documents.

view its determinations with respect to the individual documents in the light of the views set forth in this opinion.[9] Moreover, our review of the sample documents leaves us with the definite impression that if they are truly representative of those that will ultimately be held to be discoverable, appellees will acquire nothing in the way of admissible evidence on the issue of liability or on the issue of damages, either compensatory or punitive. The sample documents reveal nothing more than the prudent business decisions that any corporation must necessarily make if it hopes to survive in this litigious age.

With the foregoing qualifications, the order of the district court is affirmed.

JOHN R. GIBSON, Circuit Judge, dissenting.

The court today correctly concludes that individual case reserves set by Searle's attorneys are protected as mental impressions, thoughts, and conclusions under the opinion work product doctrine. It then concludes that averages and aggregates derived from these reserves are not protected. There is a deep inconsistency in protecting the parts but determining that the sum of the parts and calculations based upon the protected figures are not protected.

The court properly reasons that because the Searle attorneys' specific case reserve figures "embody the attorney's [sic] estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors," they reveal the attorneys' mental impressions concerning Searle's pending litigation and are therefore protected opinion work product. *Ante* at 6. The court then denies protection to the risk management documents, which were derived from the

[9] We are concerned about the reference to loss reserves for a specific case mentioned in the sample *in camera* documents submitted to us. Those references presumably should be redacted.

nondiscoverable mental impressions of Searle's attorneys and, as the special master found, "arguably [give the] plaintiffs some insight into Searle's attorneys' thought processes of setting reserves." Report I of Special Master, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 5-6 (D. Minn. Aug. 22, 1984). In allowing discovery of the risk management documents, the court fails to consider the full import of the mental impression/opinion work product doctrine, which gives virtually absolute protection to both the mental impressions of Searle's attorneys—as contained in the specific case reserve figures and necessarily reflected in the risk management documents—and the mental impressions of Searle's representatives, as contained in the risk management reports.

Since the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), the courts have recognized that particular solicitude is given mental impression/opinion work product as contrasted to the ordinary work product protection accorded other documents and materials prepared in anticipation of litigation. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court recognized mental impression/opinion work product as "deserving special protection" under Rule 26. *Id.* at 400. The Court considered, but found unnecessary to decide, whether any showing of necessity could ever overcome the protection afforded such work product. It recognized, however, that simply showing "substantial need and inability to obtain the equivalent without undue hardship" is not sufficient. *Id.* at 401. In *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), we observed that the work product doctrine protects not only materials obtained or prepared in anticipation of litigation, "but also the attorney's mental impressions, including thought processes, opinions, conclusions, and legal theories." *Id.* at 1328; *see also Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.) ("Rule 26(b)(3) recognizes the distinction between 'ordinary' and 'opinion' work product first articulated by the Supreme Court in *Hickman v. Taylor*"), *cert. denied*, 106 S. Ct. 232 (1985); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) ("opinion

work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances"). The court today fails to give full weight to the special protection accorded mental impression/opinion work product.

In the present case, we are asked to protect mental processes that go to the essence of the lawyer's expertise—establishing the value of a legal claim and the fees and expenses that may be incurred in its defense. The litigation's ultimate cost to the client has great significance in determining whether a lawsuit will be tried or settled and, if settled, for what amount. Establishing the value of a claim is analytically complex, requiring an assessment of the body of evidence and the particular legal issues involved in each case, as well as an evaluation of the case's strengths and weaknesses. It is one of the more challenging and difficult tasks a lawyer confronts. In *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269 (1969), Professor Edward H. Cooper discusses the importance of an attorney's private evaluation of a claim in facilitating the bargaining process inherent in our system of justice:

> Some of the areas in which the work product doctrine forecloses discovery are easily comprehended * * * as well. One obvious example is the need for protection against forced revelation of a party's evaluation of his case; as long as voluntary settlement is encouraged, it would be an intolerable intrusion on the bargaining process to allow one party to take advantage of the other's assessment of his prospects for victory and an acceptable settlement figure.

Id. at 1283.

The special master's report states that the aggregate reserve figures may give some insight into the mental processes of the lawyers in setting specific case reserves. This is inevitable, considering that these aggregates and averages are based upon the attorneys' evaluations of the value of specific claims. Notably, this is not a situation

where mental impressions are merely contained within and comprise a part of another document and can easily be redacted. Instead, the aggregate and average figures are derived from and necessarily embody the protected material. They could not be formulated without the attorneys' initial evaluations of specific legal claims. Thus, it is impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures.

Apparently, the court reasons that if an attorney's mental impressions are revealed only indirectly and in a diluted manner, they are not protected as opinion work product. *See ante* at 8-9 & n.3. This, however, has never been used as a criteria for applying the opinion work product doctrine. In *Shelton v. American Motors Corp.*, *supra*, we held that an attorney could not be compelled to acknowledge whether specific corporate documents existed because such acknowledgements would reveal her mental processes, which are protected under the opinion work product doctrine. *Id.* at 1329. The selection of documents involves a substantially less complex mental process than does arriving at a case reserve figure. In selecting documents, an attorney assesses a document's relevance and materiality to the legal issues in the case, and considers its admissibility. This analysis stops short of the weighing and evaluating necessary to determine case reserves. Yet, in *Shelton* we protected this information, for the opinion work product doctrine does not merely protect materials that, as the majority suggests, directly reveal an attorney's undiluted mental impressions. Instead, the doctrine is premised on values fundamental to the American scheme of justice and protects information that even "tends to reveal the attorney's mental processes." *Upjohn Co.*, 449 U.S. at 399. The risk management documents certainly fall within this protected ambit. The relationship between the attorneys' mental impressions and these documents is no less tenuous than the relationship between the attorney's mental impressions and the information we held nondiscoverable in *Shelton*. *See also*

Sporck, 759 F.2d at 315-17 (selection of documents is in the "highly protected category of opinion work product").

The court is equally in error in focusing solely on the mental impressions of Searle's lawyers. While the court protects the mental impression/opinion work product concerning the attorneys' evaluation of the reserve necessary for each lawsuit, it fails to grant similar protection to the risk management department's opinion work product concerning the aggregate reserve necessary for the Cu-7 litigation. I find no basis in Rule 26(b)(3) for this distinction. Rule 26(b)(3) requires a court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney *or other representative* of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3) (emphasis added). Thus, protected work product is not confined to information or materials gathered or assembled by a lawyer. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603, *rev'd in part on other grounds*, 572 F.2d 606 (8th Cir. 1977). Instead, it includes materials gathered by any consultant, surety, indemnitor, insurer, agent or even the party itself. Fed. R. Civ. P. 26(b)(3). The only question is whether the mental impressions were documented, by either a lawyer or nonlawyer, in anticipation of litigation. Here, in the face of pending litigation, the risk management group monitored, controlled, and anticipated the costs of the litigation. The group compiled the individual reserve figures established by Searle's attorneys and analyzed them in light of a number of variables to arrive at aggregate reserve figures. This is no less a mental impression concerning Searle's litigation than were the attorneys' thoughts in arriving at individual reserve figures.

The court concludes that the risk management documents cannot qualify for work product protection because they were not prepared in anticipation of litigation. It reasons that "Searle's business involves litigation," and, therefore, the risk management documents are for business planning purposes. *Ante* at 8. The court thus concludes that the risk management documents fall into the "ordinary course of business" exception to the work prod-

uct doctrine. *See* Fed. R. Civ. P. 26(b)(3) advisory committee note. This analysis, however, causes the exception to swallow the rule and makes the anticipation-of-litigation test meaningless as it concerns materials prepared by a defendant's employees.

First, we cannot authorize discovery of documents containing representatives' mental impressions concerning pending litigation simply because the documents also serve a business purpose. It is difficult to imagine a document that is generated by a party's nonlawyer representatives in anticipation of litigation that does not also have some business purpose; the purposes are not mutually exclusive. Under the court's analysis, almost every document prepared by a nonlawyer is subject to discovery despite Rule 26(b)(3)'s concern with protecting opinion work product of both the lawyer and nonlawyer. *See id.* ("Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.") If all such records were discoverable, a business would be seriously impaired in calculating and recording the financial aspects of litigation or in taking other necessary corporate action regarding the litigation. Of course, just as not every document an attorney prepares concerning pending litigation is protected opinion work product, neither is every business document prepared by a nonlawyer. The determination, however, should not hinge on whether the material has an ancillary business purpose.

Second, in the present case, the business purposes of the documents were to keep track of, control, and plan for the costs of Searle's pending products liability litigation. Only by concluding that Searle is in the business of litigation can the court convert these litigation-oriented documents into business planning documents. The court reaches just this conclusion, however, when it reasons that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other

things." *Ante* at 8. In eroding the protection Rule 26(b)(3) affords, the court confronts Searle with a dilemma of Catch-22 proportions: if Searle were not involved in litigation, Rule 26(b)(3) would have no application, but because Searle is involved in litigation, the ordinary course of business business exception applies. Thus, litigation, the event that triggers application of the rule, also triggers application of the exception.

Moreover, when considered within the increasingly common context of mass products liability litigation, the aggregate and average figures may take on even greater significance. Today's products liability litigation often involves hundreds of lawsuits against one or more corporate defendants based upon a single or related products. The plaintiffs in these cases usually join forces and are represented by organized counsel. The defense, if not unified, is usually coordinated. Settlements can be negotiated so as to dispose of the claims of all or several plaintiffs at once. *See, e.g.*, 3A L. Frumer & M. Friedman, *Products Liability* § 46A.07[1] (1986); Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429, 431 (1986) (Agent Orange class estimated to include between 600,000 and 2.4 million plaintiffs; 4,500 plaintiffs' lawyers settled claims for $180,000,000); Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law*, 54 Fordham L. Rev. 167, 170 n.6 (1985) (settlement fund established to dispose of 680 asbestos claims). Just as a specific reserve figure gives an opponent an unfair advantage in settlement negotiations, an aggregate reserve figure would give attorneys representing a group of opponents an equally unfair advantage. In this instance, the cases of forty plaintiffs with claims based on the Cu-7 have been consolidated for discovery in the Minnesota district court. Material that may be of questionable value in one case becomes more meaningful when considered in the context of a number of cases. We would be naive not to recognize the sophisticated analysis that is possible in this day of the computer. Comparison between different groups of cases and periods of time conceivably

could give one party substantial insight into the thought processes of the other. Therefore, when the aggregate and average figures are produced for attorneys representing a large group of opposing litigants and are examined with reference to the entire group, the opposition obtains information containing the Searle attorneys' mental processes that is much less diluted and indirect than the court acknowledges. When we deal with so sensitive a mental process as the calculation of individual case reserves, the foundation for all of the aggregates and averages, Rule 26(b)(3), *Upjohn*, *Shelton*, and *Murphy* mandate that we accord this material special protection. We fail to do so when we make the aggregate and average figures available to the opponent.

Significantly, Searle is defending not one but rather hundreds of Cu-7 lawsuits. *See* Thornton, *Intrauterine Devices*, Trial, Nov. 1986, at 44, 46 (Searle defending more than 600 Cu-7 lawsuits). Searle is undoubtedly concerned with each lawsuit, and the court properly recognizes that the Searle attorneys' mental impressions concerning each lawsuit are protected. Searle's greater concern, however, is its liability exposure and the costs related to defending this aggregate of lawsuits. When subjected to mass tort litigation, a defendant should be allowed to confidentially analyze the litigation as a whole, plan for its defense, and compare the costs of settlement with the costs of proceeding through trial. The aggregate and average reserves play an essential and unique role in these activities. By requiring Searle to share its assessments with its adversaries, the court unfairly hinders Searle's ability to organize its defense.

A party, in managing its litigation, should not be forced to provide materials to its opponent that necessarily reflect its lawyers' mental impressions regarding the litigation and contain its agents' mental impressions concerning the cost of the litigation. By concluding that the risk management documents are discoverable because they only indirectly reflect the attorneys' impressions and because they were created for business planning purposes, the

court makes it extremely hazardous for a business to finance and plan for its defense. The incidental effect of this decision could be the failure of litigants to properly document and consider all the factors that bear upon the decision to try or settle lawsuits. *Cf. Hickman v. Taylor*, 329 U.S. at 511 ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

This is not a case where there has been limited discovery. Searle has produced over 500,000 documents. Those documents based on the mental impressions of its lawyers and representatives concerning litigation strategy and costs, which the court today admits may be of limited value, should not be the subject of discovery.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5334

Debra A. and George Simon, et al., Appellees, v. G.D. Searle & Co., Appellant.	)	Appeal from the United States District Court for the District of Minnesota.

Appellant's petition for rehearing en banc is denied for lack of a majority of judges voting in favor of it.

Judge Ross, (John) Gibson, Fagg, Bowman and Magill would have granted the petition.

Petition for rehearing by the panel is also denied.

July 7, 1987

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VRAIN

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

[June 7, 1985]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. Simon and George Simon, et al.,	)	File Nos. Civ. 4-80-160, et al
Plaintiffs,	)	
vs.	)	ORDER
G.D. Searle & Co.,	)	
Defendant.	)	

A hearing was held before the undersigned on September 24, 1984, on the objections to the Report (I) of Special Master Peter Thompson, dated August 22, 1984. Leo Feeney, Esq., Thomas Christenson, Esq., and Douglas Muirhead, Esq., appeared as lead counsel for the plaintiffs. Clifford M. Greene, Esq., and Gregory L. Wilmes, Esq., appeared for Defendant G. D. Searle & Co.

In addition, Special Master Thompson filed Report (II) dated September 18, 1984, and Searle has filed objections thereto. The parties agree that no additional oral argument is necessary since Report (II) involves the same issues as addressed by Report (I).

Based upon all the records, files and proceedings herein, and upon the briefs and arguments of counsel,

IT IS HEREBY ORDERED THAT

1. Special Master Thompson's reports of August 22, 1984, and September 18, 1984, are adopted, and Searle's objections are overruled;

2. Plaintiffs shall return to Defendant all privileged documents inadvertently produced, except for the ten documents produced to other Plaintiffs' attorneys. Implementation of this paragraph of the order is stayed so that either party may move within a reasonable time to reopen the Report of Special Master Goldberg;

3. Searle's request for certification pursuant to 28 U.S.C. 1292(b) is granted (Miles W. Lord); and

4. This Order, to the extent it relates to risk management and insurance documents, is stayed until the 8th Circuit Court of Appeals rules upon a petition for mandamus concerning the same, to be filed by Searle within five days from the date of this Order.

Dated: This 7th day of June, 1985.

/s/ MILES W. LORD
The Honorable Miles W. Lord
Chief Judge

APPENDIX D

[August 22, 1984]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. and George Simon, et al.,	)	
Plaintiffs,	)	Civ. No. 4-80-160
	)	Report (I)
vs.	)	of Special Master
G. D. Searle & Co.,	)	
Defendant.	)	

These consolidated cases are referred to me as Special Master, for recommendations as to the discoverability of certain documents. Plaintiffs are provided with a description of each document setting forth the author, recipients, and general description of the subject matter of the document. Defendant has also submitted affidavits in support of the claim of privilege. After a review of the document and briefs submitted by counsel, I submitted a draft of my recommendations to counsel for comment pursuant to Fed. R. Civ. P. 53(e)(5). Counsel filed supplementary briefs and a hearing was held providing counsel the opportunity to comment on the preliminary draft. Based on all of the files and proceedings I make my report to the Court as provided by Fed. R. Civ. P. 53.

In these actions plaintiffs seek damages for injuries sustained while using the CU-7 intrauterine contraceptive device manufactured by defendant G. D. Searle & Company.

Discovery has been proceeding since 1982. In February of 1983 there was some on-site inspection of documents at defendant's headquarters in Skokie, Illinois. In July of 1983 Judge Lord ordered that a Document Depository be established in Minneapolis, Minnesota. Thousands of documents have been produced.

The documents submitted to me for *in camera* review include a group of documents referred to as Risk Management Documents and a group referred to as Patent and Trademark documents. The Risk Management documents were generated by Searle generally in an attempt to keep track, control, and anticipate the costs of its product liability litigation. Although Searle maintains product liability insurance, it has a high deductible, and to some extent, functions as a self-insurer. A specific case reserve is set by a Searle attorney for each claim based on the attorney's assessment of the litigation expense. The specific case reserve is not made public, although an aggregate product liability reserve for all claims on all products is reported on the financial statement.

The Risk Management Department, part of the Treasurers' Department at Searle, monitors the litigation and prepares periodic reserve analysis that are distributed to other departments and are used for business planning purposes. The Risk Management Department is also responsible for purchasing or renewing insurance and works with the attorneys to prepare submissions to the insurance companies. None of the documents reviewed involve Risk Management giving legal advice or playing a role in specific litigation strategy of any of the cases. The risk management documents include documents largely generated by the Risk Management Department or other departments in the corporation concerning budgetary, profitability, and insurance considerations relating to the Cu.7.

Defendant asserts three grounds for the nondiscoverability of these documents. Initially Defendant maintains that the documents are outside the scope of discovery. Defendant characterizes the documents as insurance documents and relies on the general rule that evidence of insurance

is not admissible on the issue of whether the Defendant acted wrongfully or negligently. See Fed. R. Evid. 411. Further Defendant maintains that Fed. R. Civ. P. 26(b)(2), which permits discovery of the contents of insurance agreements limits the discoverability of other information relating to insurance documents.

Rather than insurance documents, most of the documents are better characterized as ordinary business documents of the corporation assessing budgetary, financial as well as insurance needs of the corporation. Secondly, even if the documents are characterized as insurance documents, Fed. R. Evid. 411 and Fed. R. Civ. P. 26(b)(2) do not provide a total privilege for any document relating to insurance. Fed. R. Civ. P. 26(b)(2) permits the discovery of insurance agreements which might not fit the general scope of discovery as provided in Rule 26(b)(1). It does not shield documents that otherwise are discoverable under Rule 26(b)(1). Fed. R. Evid. 411 precludes evidence that a person was or was not insured only on the issue of negligence or wrongful conduct. It does not preclude business planning documents that reflect business assessment of future claims and/or profitability merely because these documents are used for the purpose of assessing insurance needs. Plaintiff is seeking to prove that the product was defective and that the defendant acted wilfully, intentionally, and fraudulently with respect to marketing the defective product. What the corporation knew, the judgments it made with respect to marketing and manufacturing the product are in issue in these cases. These documents are relevant to and are calculated to lead to discoverable evidence on these issues. That is not to say that because Defendant engaged in planning about future liability that Defendant acted wrongfully. Obviously good business practices require future planning, and the documents might well establish that Defendant acted entirely properly in its business judgments. The issue at this point is whether they are discoverable, not whether they actually prove one issue or another. The documents relate to the issue of notice, defect, and questions relating to punitive damages and are within the scope of discovery.

Next, Defendant maintains that these documents are protected by the work product privilege. To qualify for work product privilege the documents must be prepared in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947), Fed. R. Civ. P. 26(b)(3). Although the actual determination of what reserve to place on a particular case is made with reference to specific litigation, most of the documents produced were not prepared in anticipation of litigation but were prepared by corporate officials for business purposes such as budgeting questions, profitability analysis, and insurance needs. Obviously the outstanding litigation, past litigation history, and future litigation prospects are important to these business considerations. The work product doctrine, however, does not protect these business documents reflecting discussions among corporate officers in Risk Management, the Comptroller or Treasurer Departments even if the discussions are based in part on information generated by litigation. According to 8 C. Wright and A. Miller, Federal Practice and Procedure #2024:

> Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

On the other hand, many of the documents reveal specific litigation stragegy on identified cases. To the extent that a document reveals specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case, the principles of the work product doctrine are applicable to bar discovery. It would be unfair for a plaintiff to know how her particular case was assessed by Searle's lawyers. This work product privilege is not waived by sharing this information, where necessary, with corporate officers or outside auditors or insurance agents.

Documents that simply reveal aggregate reserves or aggretate projected reserves for future cases yet to be filed, not identified by case, or discussions among corporate officials centering on past experience to base future projections, or analyzing budget, profit or insurance needs do not merit work product protection. It is true that Plaintiffs could take an aggregate reserve and determine an average reserve per case, which arguably gives plaintiffs some insight into Searle's attorneys' thought processes of setting reserves. At this point, however, the connection between the document and the specific litigation strategy is too indirect. Plaintiff should not be deprived of these business documents merely because the documents rely in part on information generated in the litigation process. Furthermore, Defendants have already produced pursuant to court order, actual settlement figures.

Assuming, in the alternative, that the aggregate reserves revealed in these documents is work product, I would view it as ordinary work product subject to the substantial need and undue hardship requirement. I conclude that plaintiff has met that standard. The materials reflect on key issues pertinent to this litigation. To prove these issues the parties must have these business documents revealing the corporate action, analysis, and planning. The business planning obviously is influenced by the substantial litigation generated by the Cu. 7. Thus, it is impossible to analyze the Defendant's business assessments without reference to the past and future litigation prospects. The documents reflect corporate action, corporate judgments, corporate knowledge that could be obtained only by corporation documents.

Finally, Defendant maintains that some of the documents are protected by the attorney-client privileges. To qualify for the attorney client privilege there must be a communication between an attorney and client, concerning legal advice, and made and kept in confidence. See Minn. Stat. § 595.02(2); *Brown v. St. Paul City Railway Company*, 62 N.W.2d 688 (Minn. 1954). A business document is not made privileged by providing a copy to counsel. See *Brown v. St. Paul City Railway Co.* Thus, those

documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications.

Based on my review of the briefs and records, I recommend as follows:

1. The following Risk Management documents reveal specific case reserves or specific litigation strategy and are protected by the work product privilege: 80, 89-110, 113, 114[1], 123[2], 125-128, 130-134, 136, 138, 147-152, 235, 246-248.

2. The following Risk Management documents are attorney client communications or include an attorney-client communication and are protected by the attorney client privilege: 24[3], 48, 49[4], 51[5], 53[6], 60[7], 61[8], 69, 70, 112, 121, 135, 137[9], 233, 234, 236-244, 249.

3. The following Risk Management documents are business documents relating to budget, insurance or other business concerns, do not reveal specific case reserves and are discoverable: 1-23, 24[3], 25-47, 49[4], 50, 51[5], 52, 53[6], 54-59, 60[7], 61[8], 62-68, 71-79, 81[10], 82-88, 111, 115-120, 122, 123[2], 124, 129, 138[9], 139, 140, 141[11], 142[11], 143, 144, 145[11], 146, 235, 245[13].

4. With respect to the patent trademark documents No. 161-231, I find that all the documents are privileged by the attorney client privilege with the exception of the following:

a. Documents 175 and 196, which are communications to and from nonlawyers and thus are discoverable.

b. Documents 176, 177, 178, and 192 which are communications between the licensor and Searle's attorneys. They are not privileged because there was no attorney client relationship between the licensor and Searle's attorneys.

c. The draft of the license agreement attached to the memo in Document 205 is not an attorney client communication and is not privileged.

5. I received and reviewed no documents numbered 153-160, 232.

6. On many of the discoverable documents there is information that relates to products other than the product in dispute. If Defendant wishes to remove those portions of discoverable documents that clearly and solely relate to products other than the products in dispute, counsel should submit to me all proposed redactions by September 7, 1984.

7. Finally, Defendant seeks the return of approximately 29 documents that were determined to be privileged by Special Master Goldberg, but have been inadvertently produced to Plaintiffs. Plaintiffs maintain that the disclosure waives the privilege and they should be permitted to use the documents. Defendant has submitted affidavits from the attorneys who supervised the on-site production in Illinois and the production for the Minnesota depository. It is not known whether these documents were produced at the on-site inspection or through the Minnesota depository. The document search involved the production of several hundred thousand documents. In the affidavits counsel establish the precautions used in the effort to screen out privileged documents from the production. Based on the affidavits and presentation of counsel, I am satisfied that the Defendant took adequate precautions to protect the confidentiality of its documents and that the disclosure was not intended as a waiver of privilege. I conclude that there has been no waiver of the privilege and the documents should be returned to defendant. See *Control Data Corp. v. IBM*, 16 Fed. R. Serv. 2d 1233 (D. Minn. 1972); Note, Inadvertent Disclosure of Documents Subject to the Attorney Client Privilege, 82 Mich. L. Rev. 598 (1983).

8/22/84

/s/ PETER N. THOMPSON
Peter N. Thompson
Special Master
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2138

Footnotes

1. For D-114 memo from Roskopf to Gyenes is not privileged.

2. For D-123 only the first two pages are protected by work product. The remainder is discoverable.

3. For D-24 only the 8/8/83 memo from Liddy to Bader, Thies and Seeley is privileged. The remaining attachments are discoverable.

4. For D-49 only the following is privileged:

    1. The last four sentences of paragraph 1; the last sentence, paragraph one, page 2; and the last two sentences paragraph three, page two of Larson's 8/13/81 memo.

    2. The first two sentences of Larson's 8/3/81 memo.

    The remainder is discoverable.

5. For D-51 only the 7/17/81 memo from Roskopf to Bose is privileged. The remaining attachments are discoverable.

6. For D-53 only the following is privileged: the report of Thies found in page two, paragraph 4; page two, first seven sentences of paragraph 5; page 3, first paragraph.

7. For D-60 only the 8/25/80 memo from Roskopf to Thies is privileged. The attachments were produced to be used in part for liability limits and annual reserve review and are discoverable.

8. For D-61 only the 4/29/80 memo from Roskopf to Thies is privileged. The remainder is discoverable.

9. D-137 includes the privileged 8/25/80 memo from Roskopf to Thies referred to in n.7. The remainder is discoverable.

10. For D-81 redact methodology for figuring reserves, opinion attributed to R. Theis and claims handling procedures which are privileged.

11. For D-141, 142 redact sections on Product Liability Claim Procedures and Personnel which are work product.

12. For D-145 redact statements attributed to R. Theis which are privileged.

13. For D-245 redact second paragraph which is privileged.

APPENDIX E

[September 17, 1984]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. and George Simon, et al.,	)	
Plaintiffs,	)	Civ. No. 4-80-160 Report (II)
vs.	)	of Special Master
G. D. Searle & Co.,	)	
Defendant.	)	

Pursuant to Orders of the Court Defendant has supplemented its production of documents and has produced several hundred documents for my *in camera* inspection. Defendant maintains that the documents are not discoverable because they are not within the scope of discovery, are privileged by the attorney client privilege or are work product. I have generally addressed these issues in Report (I) of the Special Master dated August 22, 1984. I incorporate the rationale provided in that report as explanation for my recommendations with one addition.

Several of the documents submitted in this supplemental production concern matters that are sufficiently unrelated to the litigation that they are not calculated to lead to relevant evidence. Although they may relate to the

Cu 7 they do not reflect business assessments of future claims and/or profitability or issues relating to notice, defect, or punitive damages.

Based on my review of the documents, briefs, and records, I recommend as follows:

1. The following documents are protected by the work-product doctrine: 21-33, 35-38, 256, 284, 366.

2. The following documents are attorney-client communications or include attorney client communication and are protected by the attorney client privilege: 1-6, 9-18, 19[2], 20[3], 39, 42[4], 46-48, 153, 155, 160[5], 161, 163, 164, 175, 177, 227, 228, 250, 288, 289, 295, 296, 301, 326, 328, 338, 350.

3. The following documents are outside the scope of discovery: 43, 44, 156, 158, 159, 180, 192, 251, 252, 259, 264, 265, 267, 272-275, 277, 279-282, 286, 287, 294, 299, 300, 303, 304, 308, 313, 316-320, 324, 332.

4. The following documents are business documents relating to budget, insurance or other business concerns, do not reveal specific case reserves and are discoverable: 7[1], 8[1a], 34, 40, 41, 45, 154, 157, 162, 165-174, 176, 178, 179, 181-187, 188[6], 189-191, 193-203, 204[7], 205-215, 216[8], 217, 218[9], 219-226, 229-246, 247, 248, 249, 253-255, 257, 258, 260-263, 266, 268[10], 269-271, 276, 278, 283, 285, 290, 291, 292[11], 293, 297, 298, 302, 305-307, 309-312, 314, 315, 321-323, 325, 327, 329-331, 333-335, 336[12], 337, 339-349, 351-365, 367-381.

5. Exhibit A attached to the affidavit of Dr. Irvin Strathman, is prepared in anticipation of litigation and is work-product.

6. Defendant may redact those portions of discoverable documents that relate clearly and solely to products other than the products in dispute. Counsel should submit to me all proposed redactions by September 28, 1984.

7. In this supplemental production I reviewed no documents bearing numbers 49-152.

Dated September 17, 1984

/s/ PETER N. THOMPSON
Peter N. Thompson
Special Master
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2138

Footnotes

1. Redact second paragraph.

1a. Although this document was sent to an attorney, arguably for a legal response, it was also sent to two non-lawyers for a response as well. The communication to non-lawyers is not privileged merely because the same communication is sent to a lawyer.

2. Attachments G02051-56 are not privileged.

3. Attachments G02058-59 are not privileged.

4. Attached memo (G02246-50) is not privileged.

5. Only the discussion with Rogers 632078 is privileged.

6. Redact advice from Thies.

7. Redact legal department perception of Cu 7 litigation.

8. Redact legal department opinion.

9. Redact legal department opinion.

10. Redact advice of Thies.

11. Redact reference to specific claims.

12. Redact legal department procedures.

APPENDIX F

[July 11, 1985]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. and George Simon, et al.,	)	
Plaintiffs,	)	Civ. No. 4-80-160
	)	Report (III)
vs.	)	of Special Master
G. D. Searle & Co.,	)	
Defendant.	)	

On June 7, 1985, the Court overruled defendant G. D. Searle & Co. (Searle) objections to the Special Master's Reports (I and II) with respect to the production of the so-called "Risk Management" and "Insurance" documents. The Court, however, agreed to certify controlling questions of law pursuant to 28 U.S.C. § 1292(b). Each party has submitted to me a proposed order defining the issues to be certified. I have also met with the parties on this matter. Based on the parties' submissions, argument, and the files in this matter, I recommend that the Court certify the following two questions:

1. To what extent, if any, should Searle's "Risk Management" documents, prepared by nonlawyer corporate officials in an attempt to keep track of, control and anticipate costs of product liability litigation for business purposes (including budgetary, profitability and insurance analysis),

be protected from discovery by the Work Product Doctrine or the Minnesota attorney-client privilege because some portions of the documents reveal aggregate case reserves and aggregate litigation expenses for all pending cases when each individual case reserve is determined by Searle's lawyers on a confidential basis in anticipation of litigation?

2. To what extent, if any, does Fed. R. Civ. P. 26(b)(2) limit the discoverability of Searle's "Risk Management" documents that relate to insurance considerations?

I have attached a proposed order (App. A.) for the Court's consideration.

Searle argues that the first question should include reference to the fact that it maintains a high deductible in its insurance coverage and thus to some extent is self-insured. Whether Searle has a high deductible or low deductible, or no deductible does not alter the basic legal issue. Since the recommended question specifically refers to Searle's documents, the question is broad enough for Searle to argue on appeal that its status as a partial self insurer should be controlling or otherwise justify reversing the Court's determination on these documents.

Searle also argues that the question should indicate that the documents reveal the methodology for setting case reserves. "Methodology" is a broad term. Since the documents reveal aggregate case reserves and average case reserves, they reveal to some extent the methodology for setting case reserves. An effort was made, however, by the Court to protect against revealing "specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case." Special Master's Report I, at 5. To this extent the documents or portions[1] ordered to be produced do not reveal methodology for setting case reserves. The extent to which the

[1] The redaction process as contemplated in the Masters' Reports has not begun.

documents *improperly* reveal Searle's methodology can be argued on appeal.

Searle also has submitted additional issues to be certified. I have attached Searle's proposed questions to this Report as Appendix B. The remaining issues proposed by Searle do not raise controlling issues of law that can be certified under the statute.

Plaintiffs object to Question 2 maintaining that there is no "substantial grounds for difference of opinion" on this issue. The parties, however, have not provided any directly controlling authority on this issue.

Counsel for the parties have been meeting on a regular basis to work out procedures and coordinate the discovery process. Most of the issues are being worked out by agreement. I anticipate that the parties will soon have a stipulation setting forth the ground rules, timetable and procedures for completing the discovery and preparing these cases for trial. I have scheduled a hearing for July 31, 1985, to consider unresolved matters.

/s/ PETER N. THOMPSON 7/11/85
Peter N. Thompson
Special Master
1536 Hewitt Avenue
St. Paul, Minnesota 55104
(612) 641-2138

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5334—MN

Debra A. and George Simon, et al.,	)	
Appellees,	)	Appeal from the United States District Court for the District of Minnesota.
v.	)	
G.D. Searle & Co.,	)	
Appellant.	)	

The motion of appellant to stay the issuance of the mandate pending certiorari proceedings is granted. Issuance of the mandate is stayed until August 31, 1987. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 30, 1987

Order Entered at the Direction
of the Court:

/s/ ROBERT D. ST. VRAIN

Clerk, U. S. Court of Appeals,
Eighth Circuit.

APPENDIX H

Rule 28.1 Listing

G. D. Searle & Co. is a wholly-owned subsidiary of Monsanto Company.

The following are domestic subsidiaries or affiliates of Monsanto Company and G. D. Searle & Co.:

Monsanto

ACM Services, Inc.
InnoVen II Corporation
Invitron Corporation
Kinetek Systems Incorporated
Monsanto Venture Capital, Inc.
Monsanto Venture Capital II, Inc.

G. D. Searle

Lorex Pharmaceuticals

The following are foreign subsidiaries or affiliates of Monsanto Company and G. D. Searle & Co.:

Monsanto

Advent Eurofund Limited [Island of Jersey]
Advent-Techno Venture Investment Corp. N.V. [Netherlands Antilles]
Australian Fluorine Chemicals Pty. Limited [Australia]
Chemstrand Overseas, S.A. [Panama]
Companhia Brasileira de Estireno [Brazil]
Fosbrasil S.A. [Brazil]
Hydrocarbon Products Pty. Ltd. [Australia]
Industrias Resistol, S.A. [Mexico]
K. K. Astro [Japan]
Korag Company Limited [Korea]

Korsil Company Limited [Korea]
Limewood Run-Off Limited [England]
Mitsubishi Monsanto Chemical Company [Japan]
MonGard Ltd. [Bermuda]
Monsanto Chemicals of India Limited [India]
Monsanto Chemicals (Thailand) Limited [Thailand]
Monsanto (Malaysia) Sendirian Berhad [Malaysia]
Monsanto Overseas, S.A. [Panama]
Monsanto Services International S.A. [Belgium]
MonSure Ltd. [Bermuda]
Montal (Insurance) Limited [England]
Nippon Cooper Kabushiki Kaisha [Japan]
Nippon Fisher Company, Ltd. [Japan]
Nomix Manufacturing Company Limited [U.K.]
NutraSweet AG [Switzerland]
Quimica do Triangulo Ltda. [Bermuda]
Revertex Industries (Aust.) Pty. Limited [Australia]
Revertex Industries (N.Z.) Ltd. [New Zealand]
Revinex Australia Limited [Australia]
Ryowa, K.K. [Japan]
Titan Chemicals Limited [New Zealand]
Tsukuba Service Company, Ltd. [Japan]

G. D. Searle

G. D. Searle (Philippines) Inc. [Philippines]
Laboratoires Searle S.A. [France]
Lorex Pharmaceutica B.V. [Netherlands]
Lorex Pharmaceuticals Ltd. [U.K.]
Searle India Ltd. [India]
Searle Korea Limited [Korea]
Searle Pakistan Ltd. [Pakistan]
Searle Yakuhin, K.K. [Japan]